UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MARGARITA YEFREMOV, Complainant, v. NYC DEPARTMENT OF TRANSPORTATION Respondent.	)))) 8 U.S.C. §1324b Proceeding) Case No. 92B00096))))

FINAL DECISION AND ORDER
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MARVIN H. MORSE, Administrative Law Judge

Appearances: Margarita Yefremov, pro se
Marcia J. Goffin, Esq. and
Mercedes Colwin, Esq., for Respondent.

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an unfair immigration-related employment practice to:

. discriminate against any individual other than an unauthorized alien with respect to discharge from employment because of that individual's national origin;

. discriminate against a "protected individual" with respect to discharge from employment because of that individual's citizenship status. 8 U.S.C. §1324b(a)(1). A "protected individual" is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee or granted asylum, 8 U.S.C. §1324b(a)(3);

. "intimidate, threaten, coerce, or retaliate against any individual" in order to interfere with any right or privilege secured under §1324b or "because the individual intends to file or has filed a charge or a complaint," or assisted, or participated in any manner in a §1324b investigation, proceeding, or hearing. 8 U.S.C. §1324b(a)(5).

The cause of action codified as amended at §1324b was enacted out of concern that enforcement of the employer sanctions program, 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," H.R. Conf. REP. No. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA authorizes private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not file a complaint. 8 U.S.C. §1324b(d)(2).

II. *Procedural Summary*

A. The Charge and the Complaint

Complainant, Margarita Yefremov (Yefremov or Complainant), filed a citizenship and national origin discrimination charge with the Office of Special Counsel (OSC) on October 6, 1991. The charge alleged unlawful conduct by the City of New York Department of Transportation (DOT or Respondent). Inter alia, the OSC charge described the claimed retaliatory discrimination:

> He [Si Simon] warned for many times that I will be terminated because of my English and my protest against unfair evaluation and my complaint to EEOC of DOT [Department of Transportation].

OSC charge, at paragraph 8.

OSC's February 5, 1992 determination letter advised that "based on our investigation, we have decided not to file a complaint," and notified Complainant that she could file a complaint directly with an administrative law judge within 90 days. 28 C.F.R. §44.303(c)(2).[1]

[1] Citation is to the rules of practice and procedure for hearings before administrative law judges, as last amended by final rule (57 Fed. Reg. 57669) (1992), effective December 7, 1992 (to be codified at 28 C.F.R., Part 68).

On May 6, 1992, Yefremov timely filed a pro se complaint dated May 3, 1992. Her complaint was filed on the Amended Complaint (Com-plaint) form provided by the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleged that the City of New York Department of Transportation (Respondent or DOT) discharged her on the basis of her citizenship status and/or her Russian national origin.

The Complaint did not reiterate the retaliation claim. However, taking into account Complainant's pro se status, I understood the Complaint to embrace all the OSC charges, including retaliation. Complainant requested reemployment, back pay from September 9, 1989, and attorney's fees.

B. The Notice of Hearing

On May 18, 1992, OCAHO issued a Notice of Hearing which transmitted the Complaint to Respondent.

C. The Answer

An Answer was filed on July 2, 1992. DOT admitted that it had employed and subsequently discharged Complainant. DOT denied that the discharge was motivated by citizenship status discrimination and/or national origin discrimination. Respondent asserted that the Complaint was time-barred, that it failed to state a claim upon which relief could be granted, and that OCAHO lacked jurisdiction over the national origin claim because Complainant had previously filed a Title VII suit based on the same set of facts.

D. Complainant's Response

On July 13, 1992, Complainant filed a sua sponte response to the Answer. She asserted, inter alia, that an interagency conspiracy had allowed the alleged discrimination and retaliation to occur and now prevented her from obtaining the process and vindication to which she was entitled. She implicated DOT, the New York State Division of Human Rights (SDHR), the Equal Employment Opportunity Commis-sion (EEOC) and the Law Department of the City of New York. Yefremov also asserted that documents relied on by Respondent to support the defense against her claims were fraudulent, either altered or forged. Complainant's assertions were reiterated in a plethora of written motions, orally at hearing, and in post-hearing filings. Respondent's fundamental counter to these allegations is a denial of

Complainant's factual claims and a defense that Yefremov was discharged because of her professional incompetence.

E. National Origin Claim Dismissed

On October 1, 1992, I dismissed that portion of the complaint alleging national origin discrimination for the reason that DOT employed more than fourteen individuals. 8 U.S.C. §1324b(a)(2)(B). Complainant also had a District Court case pending under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§2000-e et. seq. Accordingly, I held that a §1324b claim arising out of the same facts was barred. 8 U.S.C. §1324b(b)(2). I expressly retained the claims of citizenship status discrimination and of retaliation. Order (10/1/92), reiterated and expanded in Order Denying Respondent's Motion For Summary Decision. 3 OCAHO 466 (10/23/92) at 2-3.

F. The Complaint is Timely

The 10/23/92 order also rejected a motion by DOT for summary decision; DOT had claimed that Complainant's delay until October 1991 in filing her charge with OSC was fatal to her case because she had exceeded the 180-day statutory period of limitations after an alleged discrimination for filing a charge with OSC. 8 U.S.C. §1324b(d)(3). As explained in the order, Complainant filed a charge with the EEOC by a filing with the New York State Division of Human Rights (SDHR), on September 13, 1989, only four or five days after the alleged discrimination. On October 10, 1991, Yefremov filed her OSC charge. Subsequent to Complainant's OSC filing, on September 20, 1991, SDHR issued its determination letter, which was affirmed by the New York District Office of EEOC on November 5, 1991.

OSC and EEOC have adopted a Memorandum of Understanding (MOU). 54 Fed. Reg. 32499 (1989). Each agency appointed the other as its agent to accept charges, thereby tolling the time limits for filing national origin and citizenship discrimination charges. The effect of the MOU is that a filing with OSC is understood to be a constructive simultaneous filing with EEOC and vice versa. Curuta v. U.S. Water Conservation Lab, 2 OCAHO 459 (9/24/92). A timely EEOC filing cures the tardiness of a subsequent OSC filing. The purpose of the MOU is to ameliorate uncertainty as to the correct forum resulting from separate jurisdiction (EEOC on the one hand, and IRCA administrative law judges on the other) . . . Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90) at 18. See also Curuta; U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) at 29, [Footnote omitted].

I concluded that the MOU protects a complainant whose claim sounds only in citizenship discrimination, as well as one whose claim implicates national origin discrimination. The MOU provides that charges are to be referred by one agency to another where

> it becomes apparent to the agency processing the charge that the charge or any aspect of the charge falls outside its jurisdiction but may be within the jurisdiction of the other agency. . . . .

MOU, 54 Fed. Reg. at 32500.

It follows that Complainant timely filed her charge albeit with the wrong agency. The EEO filing protects her against a defense of untimely filing with OSC. 3 OCAHO 466, at 3-4.

G. Prehearing Motions

There were numerous prehearing contretemps primarily involving discovery conflicts. In deference to Complainant's pro se status, Respondent was directed to comply with Complainant's discovery requests, even in instances where duplicate documents may have been included. I directed Yefremov to comply with Respondent's request to depose her; eventually she did so. At Complainant's request, Respondent provided translation services at the deposition.

H. Evidentiary Hearing Held

Respondent asked for two postponements of the evidentiary hearing. Si Simon, a principal DOT witness, had relocated to Florida. Respon-dent based its postponement requests on the claim that Simon was incapacitated by ill health and, therefore, could not travel to attend the evidentiary hearing in New York. Respondent's first motion for postponement of the evidentiary hearing was granted. A subsequent continuance motion was denied, and Simon testified by telephone.

An evidentiary hearing was held on December 21, 22 and 23, 1992, in New York City. The post-hearing schedule contemplated that the parties would file motions to correct the transcript, and would file concurrent briefs. DOT purchased the transcript and on February 26, 1993, provided a copy to Complainant.

I. *Complainant's January 1993 Post-Hearing Filing*

Complainant made filings on January 4, 1993 and March 15, 1993, which were, in effect, post-hearing briefs. Those filings embellished

her earlier allegations, i.e., that during Complainant's DOT employment she had been a victim of citizenship status discrimination and retaliation and that she has continued to suffer discrimination and retaliation at the hands of a conspiracy of governmental agents, including the judge. On January 4, Yefremov filed, sua sponte, a 17 page "Motion for Summary Conclusion and Suggestions after the Hearing," dated December 24-31, 1992. A reprise of her contentions, its cavil against the judge is a shade less harsh than its criticism of the employer's ill motives, in concert with SDHR and EEOC. For example,

> You knew that the dangerous behavior of the Respondent and Law Department was exposed in active creation of the super-secret files against the citizen of the USA of a Russian origin Margarita Yefremov.
>
> * * * *
>
> You knew that these documents were used as the ground for making the illegal anti-Constitutional Determination and Order after Investigation by the SDHR on September 27, 1991. You knew and you prevented me from asking many questions at the hearing, trying to cover-up widely known facts of violations on my national origin and citizenship status in this country committed by the Department of Transportation and its friendly allies - the SDHR and EEOC. My case is not an ordinary case of the violations on civil and human rights. It is openly political case involving expression of the ultra right wing ideology.
>
> * * * *
>
> As a highly educated jurist with a special education and experience in criminology, as a specialist who conducted the most sophisticated criminalistic expertises in handwriting and signatures, as well as the expertises of the technical condition and performance of the documents, I know that all the documents used against me by the SDHR and EEOC are fraudulent and that they were performed by the Respondent and its legal representative Law Department. It means that the violation on my civil and social rights, the violations on my citizenship status were covered by committing the new crimes - mass production of the forgered documents much later after my termination and much later after removal Si Simon and George Goodman from their highly paid positions which they occupied according to the forbidden rules of protection and patronage, not because of their exceptional knowledge or devoted experience.
>
> * * * *
>
> Ms. Goffin tried to deceive you received your approval for mailing to Si Simon, the witness in this case, the forgered documents which were used by the SDHR and EEOC as the evidences of my job performance. I did not approve Ms. Goffin's request, but I am not equal party in this case and you proved it. From the first glance at her request it was obvious that she wants to coach Si Simon how and what to tell you at the hearing by telephone on December 22, 1992.
>
> It means that you were just one inch from the fall. You limitlessly trusted to Law Department and its disgraceful counsels and they used your trust to authority of agency in their mercenary-oriented interests to deceive justice.

What happened before and what was committed by Law Department and its representative at the hearing Ms. Goffin, must be investigated in the near future and you have to make the presentation to the special agencies of the government of New York.

* * * *

I want you to take in account that the legal representative of the Respondent, as well as Ms. Goffin and her boss O. Peter Sherwood, are aware of their involvement in committing the crimes against the laws of the USA and they attempted to cover-up these crimes using your trust to the authoritative power of Law Department. It is a political case, your honor. Now is my business as the honest citizen of the USA to ask about assistance to me addressing my request to the world-wide audience. My case is an evidence that some governmental agencies and departments are still cooking the books against the innocent citizens of the USA using the recipes of the Cold War time.

* * * *

It was prematurely expressed joy that the discriminated citizen of the USA of the Russian origin lost her case at U.S. Department of Justice. I never will loose case cooked by the Department of Transportation, Law Department, EEO of the DOT, the SDHR, EEOC and Department of Personnel. Yes, I am alone against the powerful city, state and federal agencies violated my citizenship status, but I will not give up even one inch in my just war against the pack of the criminals. Till last days I trusted to justice, but now I see what kind of justice can be used against the citizen of the USA of the Russian origin. I saw how you were ready to accept any forgered document as the authentic, genuine. I saw how you were going to let pass the importance of fraudulent documents of the Respondent and Law Department. I was shocked that you did not give me the opportunity to interrogate the witnesses. It is why I decided to write my request for assistance in my just war for my civil and human rights as the citizen of the USA. I direct my request to the world-wide audience.

* * * *

Both of these commissions [SDHR and EEOC] became the toys in the hands of the criminals of the DOT and Law Department. It is not corroborated at the hearing who was the initiator of the new version on my termination. But the circle is defined: the Department of Transportation, its legal representative - Law Department, the SDHR and EEOC.

* * * *

Because the legal representative of the Respondent did not regard me as the equal party in this case and presented secretly her wish about illegal dismissal of my complaint, I find that my letter to you must not be revealed to the respondent. I hope that the copies of this motion in name Attorney General of the USA Zoe Baird will be my first signal about exceptionally important meaning of this case fabricated by the Respondent against the citizen of the USA of a Russian origin.

* * * *

(Unedited text, as in original).

This unsolicited letter-pleading bears no certificate of service nor other indicia of service on DOT, and, therefore, violates 28 C.F.R. §68.6(a). Yefremov previously had been cautioned at least twice that "every filing must be served on the party, and accompanied by a certificate to that effect." Order (10/1/92); First Prehearing Conference Report and Order (8/19/92). Importantly, failure of service violates basic concepts of fair hearing and civility. See Palancz v. Cedars Medical Hosp., OCAHO Case No. 91200197 (4/24/92) (Order) at 2 (admonishing pro se complainant that "it is impossible to tell whether or not" complainant served a pleading on other parties).

Complainant's failure to effect service in the case at hand was deliberate, not accidental. She proclaimed her failure to share the filing with DOT, "[B]ecause the legal representative of the Respondent did not regard me as the equal party in this case and presented secretly her wish about illegal dismissal of my complaint, I find that my letter to you must not be revealed to the respondent." The January 4 filing was accompanied by the tender of documents, marked KC through KM. In this respect, the OCAHO rules are explicit:

> Documents submitted for the record after the close of the hearing will not be received in evidence except upon ruling of the Administrative Law Judge. Such documents when submitted shall be accompanied by proof that copies have been served upon all parties, who shall have an opportunity to comment thereon.

28 C.F.R. §68.50.

In context of the failure to effect service, the tender is rejected.[2]

Yefremov's January 4, 1993 filing is, moreover, a prohibited ex parte communication, the penalty for which may include "an adverse ruling on the issue which is the subject of the prohibited communication." 28 C.F.R. §68.36(b). In view of its omnibus sweep across all her claims, Yefremov's ex parte filing invites an adverse ruling on the entire case. However, I will not dispense with a decision on that basis. Patently,

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[2] In any event, none of the proffer is probative of any dispute of material fact. One tendered document (KD-KE) is an unsigned Complaint No. EM01677-08-30-89, on behalf of Yefremov, on a form of the New York City Commission on Human Rights. The unsigned, unsworn, undated complaint alleges national origin discrimination and retaliation; it is unexecuted, despite specific direction to do so (KC). Proffers KF and KG reflect labor union post-employment insurance payments by her for medical insurance coverage, ostensibly for a period she claims she was still employed. Because the fact of discharge is not in dispute, it is immaterial to this case whether or not they imply discharge on one date or another. KH through KM reflecting overtime hours between June 27 and October 21, 1988, are not relevant to any issue of material fact.

the filing is undeserving of consideration on its merits, as ex parte and as unsolicited. It is held for naught, except as examples of Complainant's unwillingness or inability to follow directions, her mind set, and diction.

J. Transcript Corrections Discussed

On March 2, 1993, DOT filed a modest list of transcript corrections, primarily to accurately identify who was speaking at a particular point in the hearing. The proposed corrections at pages 92, 94, 99, 167, 543 and line 1, page 562 are adopted. However, the correction at line 23, page 110 should be to substitute "Colwin" for "Yefremov;" the reference at line 9, page 562 should instead be to line 6, page 563.

On March 15, 1993, Complainant filed a Reply Motion to correct the transcript. I adopt the specific corrections implied on page 4 of her pleading assigned to transcript pages 335, 336 363, 404 and page 524, line 25. The proposed correction to page 524, line 21 is rejected; the proposed correction can only be understood to pertain to text at line 15, not line 21. As so understood, the transcript conforms to my recollection of Complainant's phraseology.

I adopt also as corrections, the explicit transcript references at page 4 of the March 15 filing, but I substitute "conference" for "confidence" at page 302, lines 14 and 20. On the same page, I paraphrase her correction at line 23 to read "handwriting of Si Simon" in lieu of the word transcribed immediately preceding "Simon."

Beyond those specifics, Yefremov's March 15 filing contains a number of rhetorical challenges to the transcript. One category of her challenges addresses accuracy, but as she fails to propose substitute text, they are not accepted as proposed transcript corrections. In any event, I conclude that they do not implicate any genuine issue of material fact bearing on the outcome of this case.

Identification of "Yefremon" in the third transcript volume, for December 23, 1992, is understood to refer to Complainant.

K. Complainant's Allegations of Transcript Tampering Rejected

Complainant's March 15 filing accuses the judge of taking at hearing "all measures to cover the truth," and of editing the transcript, allegedly in concert with Respondent's counsel. Repeatedly, Yefremov ties the alleged transcript tampering to receipt by the judge of her pleading filed January 4, 1993.

Not content with alleging deletions, Yefremov claims that text has been added to the transcript to record remarks not actually made at hearing. For example, she asserts that "[Y]ou placed a question into my mouth," citing page 438, lines 5-6, where Complainant cross- examined DOT witness Linda Alymer. She claims also that Alymer's redirect, page 438, and additional cross examination, 439-442 never occurred. Similarly, she claims that Goodman's testimony is expanded beyond that actually given. She claims the judge at page 566, lines 1-2, "changed his [Goodman's] original testimony. Suggesting fake text has been added, Yefremov finds "a different version of his answer which I never heard at the hearing."

Complainant claims that the transcript contains testimony (more than 30 pages of colloquy, including cross examination by Complainant) of DOT witness Sherry Ann Kavaler that never took place: "Her [Kavaler's] testimony on pages 619-652 is added by your version on benefit of the Respondent." Again, claiming that testimony of DOT witness Manuel Garcia "is edited too" she contends the judge "changed his [Garcia's] openly shameless testimony. . . ." In contrast to the claim of transcript tampering, she asserts that the judge accepted as truthful [five months before this decision is rendered] the testimony of Garcia she claims to be false. And again, as to Linda Alymer, Complainant asks and answers,

> From what sources were taken the expended (sic) pages of testimony of Ms. Aylmer placed on pages 438 to 442? It seems that she continued her testimony after leaving the court room!

Notably, except for two questions by DOT on redirect examination on page 438, pages 439-442 comprise colloquy and questions by Yefremov and the judge.

The judge faces an obvious difficulty in addressing Complainant's cri-ticisms. Even a cursory reading of this case file, let alone the January 4, 1993, and subsequent filings, makes clear the danger. Failure to accord Yefremov the full satisfaction she deems her due, risks inclusion in the claimed conspiracy. If Complainant's remarks were made by an attorney, they would be censurable. In her case, they are merely contumacious.

Obsession with the rightness of one's litigating posture is not remarkable. However, a patently pervasive delusion which triggers claims of concerted wrongdoing by public officials with attendant threat of charges against the trial judge cannot pass unnoticed.

The judge has not discussed the transcript of this case outside the United States Department of Justice. At no time were instructions given, explicitly, or otherwise. At no time did I authorize, expressly or by implication, the official stenographer or any other individual to affect the contents of the transcript. So far as I am aware, no person or entity has done so.

Complainant's effort to draw the judge into the claimed conspiracy against her fails to reckon with the nature of the venue in which the case arises. The administrative law judge has no a priori interest in whether one or the other party prevails, and is totally indifferent to the outcome. Moreover, this is a private action pursuant to 8 U.S.C. §1324b(d)(2). The Department of Justice has no stake in the outcome of this case. Its only role is to fulfill its statutory obligation to provide a judge to determine whether there is a preponderance of evidence that one party has engaged in an unfair immigration-related employment practice against the other. §1324b(g).

A number of transcript passages reflect less than perfect diction and syntax. Oral communication at hearing typically lacks the precision and polish of edited, written prose. Here, where English is not Complainant's native language, the discrepancy is even more evident. The opportunity for the parties to propose transcript corrections invites corrections of substance; it is a means to perfect the record to reflect reality, not a device to conver oral delivery to impeccable prose. Complainant's failure to propose specific corrections leaves the record less perfect than it might have been, but does not inform whether the imperfections are significant.

I reject out of hand the contention that passages have been added or deleted by direction of the bench. While some passages are garbled, I find the transcript to be a substantially accurate and thorough record of the hearing. I find nothing sinister in the omissions asserted by Yefremov. Instead, omissions are attributable to her interrupting and talking over the voices of others, and to the inability of the recording equipment to pick up voices not in proximity to the microphones.[3]

[3] As explained at hearing, the microphones were for the official stenographer's recording apparatus, not for audio amplification. Tr. 14. The official stenographer was entirely dependent on voice recording equipment, and did not utilize additional stenographic mechanisms. Complainant and other participants were cautioned to speak up and against continuing to talk away from the microphones and while others were speaking. Tr. 8, 27, 28, 199, 207, 370, 381-382, 437, 548, 583, 643, 657-658.

On April 5, 1993, Complainant filed an opening post-hearing brief. On April 13, Respondent filed a post-hearing Memorandum (R. Memo). On April 26, Complainant filed a post-hearing reply brief (Cplt. R.B.).[4]

Claiming that DOT "violated many times your orders," Complainant contends, "But I know, if I violated even one closing date, my complaint were thrown from your office." Cplt. R.B. at 1. Nevertheless, her Reply Brief was filed out of time.

III. *Statement of Facts*

A. Background Information

Complainant is a naturalized United States citizen of Russian na-tional origin. She had a law degree in the Soviet Union where she was a criminologist. She earned a Bachelor of Science degree, cum laude, from the School of General Studies, Touro College in New York City, on November 11, 1987. She began her DOT employment on May 2, 1988, as a provisional employee assigned as an Assistant Accountant, Revenue and Accounts Receivable unit, Division of Fiscal Affairs. Her last day at DOT, in the Fiscal Affairs Accounts Receivable unit, was September 8, 1989.

B. Assignment in Revenue and Accounts Receivable

When Complainant started to work at DOT, her immediate supervisor was Michael Tohl (Tohl). Tohl reported to George Goodman (Goodman), Chief, Revenue & Accounts Receivable; his supervisor was Si Simon (Simon), DOT's Director of Fiscal Affairs.

Yefremov obtained her job in response to an advertisement in the New York Times. She was hired after interviews by Simon and Goodman. The employment eligibility verification requirement of 8 U.S.C. §1324a was satisfied when she presented her U.S. passport.

Within a few weeks after her employment began, Complainant was obliged to execute a two-page document; the first page is entitled "Tasks and Standards Information Sheet," the second page is a "Tasks

[4] Curiously, despite repeated allegations in Complainant's March 15 filing alleging transcript tampering as a consequence of her January 4 filing, DOT failed to challenge or inquire about the January document. Similarly, I understand from its silence that DOT has rested on its Memo, ignoring the effort by Complainant (Cplt. R.B. at 34-46) to take up the exhibits tendered in January, and rejected, supra.

and Standards Recording Sheet." (Cplt. Exh A-1,2;Resp. Exh. 3). The two pages were signed by George Goodman as supervisor, dated June 14 and June 18, respectively. Both were signed by Yefremov on June 20, 1988. The second page describes standards for performance. That page is referred to by the cover sheet on which Yefremov acknowledged receipt of the "attached list of Critical Tasks and Standards for my position." The first page was endorsed by Simon as Director, Fiscal Affairs, on June 29, 1988. The "Tasks and Standards" sheet signed by Yefremov on June 20, 1988 is in sharp contrast to the DOT Nonmanagerial Performance Evaluation Sheet which describes actual performance. Resp. Exh. 4.

Goodman discussed with Yefremov the tasks and standards expected of the employee. She has consistently characterized these two pages as a favorable performance evaluation. Respondent characterized this document as tasks and standards, which described Yefremov's responsibilities as a revenue and accounts receivable assistant accountant. Complainant's performance requirements were specified on the "Tasks and Standards" Recording Sheet. The unit's responsibilities included billing and collecting fees and recovering costs as the result of activities of contractors who dig up city streets for gas, plumbing or electrical work. Yefremov and her co-worker Linda Alymer (Alymer) were responsible for processing corrective actions and back charges for such activities.

Alymer was out of the office on sick leave due to hand surgery, from June 7, 1988 until August 25, 1988. On her return, she was promoted and assigned to assist and direct Complainant. Alymer was critical of and not satisfied with Yefremov's performance. Alymer testified that despite indication by Yefremov that she understood what she was told, Yefremov's fiscal calculations and filing were careless even after repetitive instructions. Alymer so informed Simon, Tohl and Goodman. Goodman told Simon of the complaints about Yefremov's work performance. Alymer was told to reinforce Yefremov's training, and answer her questions. In turn, Simon told Goodman essentially the same thing.

Alymer became the Revenue and Accounts Receivable unit supervisor in January 1989. Alymer recalls having talked to Yefremov several times each week as errors occurred, and that Yefremov was very defensive, accusing Alymer of a vendetta, nitpicking, looking for errors.

By March, 1989, tension between Alymer and Yefremov had escalated. According to Complainant, but denied by Aylmer, Alymer

told her she despised her. One of Alymer's complaints was Yefremov's inability to communicate in English.

C. Transfer to Accounts Payable

Simon attempted to resolve the situation by providing an opportunity for Yefremov to improve her professional productivity. Manny Garcia (Garcia), is a naturalized U.S. citizen, a native of Cuba. Garcia had mastered English which was not his first language, and been promoted to a managerial position as chief of vouchering, Accounts Payable.

Simon transferred Yefremov to Accounts Payable on March 14. Garcia was to assist her. Simon was sure she would be a good employee; he instructed Garcia to give her a fresh start. Simon did not inform Garcia of Yefremov's difficulties in Revenue and Accounts Receivable.

Goodman discussed the transfer with Yefremov, suggesting she should consider the new assignment as a new start.

Complainant's Tasks and Standards in her new job included preparation of "vouchers for payment of vendor's invoices and petty cash," maintaining appropriate logs and records. Resp. Exh. G-1.

Two weeks after the transfer, on March 30, 1989, Simon held a meeting with Garcia and Yefremov. Simon's memo to files of that date recited:[5]

> After repeated complaints from Manuel Garcia her immediate supervisor -
>
> A meeting was held with Ms. Yefremov explaining that the unit expected quicker results and an attempt at meeting deadlines.
>
> Ms. Yefremov felt she was working hard.
>
> Mr. Garcia was brought in to discuss how long we expected particular tasks to take.
>
> While agreeing that she was still unfamiliar with all aspects of the position - It was made clear that we expected better results.

[5] Yefremov made an issue over this and a number of other DOT internal administrative documents pertaining to her on the grounds that she had not been granted concurrent access to them when they were originated. Tr. 94. I find nothing out of the ordinary in the creation and filing of personnel documents by supervisory officials out of sight of the subject employee.

Resp. Exh. 7.

D. Annual Evaluation

One year after she came to work at DOT, an annual evaluation was prepared, assessing Yefremov's employment in Revenue and Accounts Receivable. The DOT Nonmanagerial Performance Evaluation Sheet provides for ratings of "outstanding, very good, satisfactory, condi-tional, unsatisfactory and unratable." Dated and signed by Goodman on May 10, 1989, her evaluation was "unratable" in two tasks on the bases that she had not been required to perform the tasks described. Of the two on which she was rated, she received a "satisfactory" rating for preparing monthly Ferry Vehicle Reports. She received a "condi-tional "rating for preparing records and collecting billing information:

> Ms. Yefremov devoted most of her time to this task. She did not receive as much training as desirable due to the heavy volume of work in her unit. Although her progress was slow, Ms. Yefremov gradually was learning and improving in her position. However, because of the short period of time in this office, and her slow progress, a conditional rating must be given.

Resp. Exh. 4.

The overall rating was conditional. Under "Supervisor's Plans and Recommendations," it is noted that "Employee now works in another office within Fiscal Affairs." Id.

Although she did not sign the evaluation form at the place indicated for the employee's signature, she penned this note at the end of the document:

> I don't agrEE with this evaluation because of its prejudice, Racism discrimination. Its humiliate [?] my dignity as professional, as woman and as human being.
> /s/Margarita Yefremov
> Evaluation gotten 5/10/89 M. Yefremov

Id.

Simon endorsed the evaluation on May 11, 1989. On the same day, he wrote a memorandum to Yefremov:

> At a meeting this morning I advised you that I believed your comments at the bottom of your evaluation were inappropriate. A performance evaluation is for a supervisor to evaluate you, not for you to evaluate him.
> Mr. Goodman's evaluation of conditional seems fair, since you were under his supervision for only six months.

> I also advised, that if you felt that you were discriminated against, you had a right to bring charges. These are serious charges and it will be your responsibility to prove them.
>
> Transferring you to a different unit within Fiscal Affairs was an effort to treat you as fairly as possible. Giving you an opportunity to report to a different supervisor, with new responsibilities, was intended to assist you in making good.

Resp. Exh. 5. (See also, Cplt. Exh. 22).

Goodman described Yefremov's main responsibility as preparing records and collecting billing information for DOT. Yefremov had deserved a rating of "unsatisfactory," not "conditional," but he did not want to see her fired." (Tr. 557).

E. DOT EEO Complaint Filed

On May 17, 1989, Yefremov filed a DOT EEO complaint in letter form. Criticizing the May 10, 1989 evaluation as an "undeserved stigma," she blamed her rating on Alymer's "rudeness, arrogance and dislike," Goodman's support for Alymer and his prejudices: "Given such circumstances, I have the right to call this evaluation prejudiced, racially motivated and discriminative." Cplt. Exh. F-4. The letter stated that Goodman had told her that if she did not like it and is unhappy, "go back to the Soviet Union." Cplt. Exh. F-3.

Yefremov also alleged that:

> [o]n May 11, 1989 I was told that "because you wrote this remark on your evaluation, you will be terminated." Three times, from March 13 to May 11, 1989, I was warned I would be terminated.

Cplt. Exh. F-4.

Yefremov's letter contrasts the May 10, 1989 evaluation to execution of the "Tasks and Standards" on June 20, 1988, characterizing the earlier exercise as a positive evaluation:[6]

> [m]y performance at this unit was evaluated on June 20, 1988 with positive rating of tasks 36, 33, 39 and 22.

Cplt. Exh. F-1.

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[6] Complainant's insistent reference to the June 20, 1988 exercised as a performance evaluation is discussed, infra, at IV. G. See also Tr. 54-55, 56, 568-574.

On June 26, 1989, EEO issued a determination letter which found "no indication of discrimination or harassment based on your Ethnicity and Religion." Cplt. Exh. G.

Yefremov's May 17, 1989 letter, two months after she reported to Accounts Payable, distinguished the new work environment from her former one in Revenue and Accounts Receivable:

> I must stress that now I am happy to feel the mutual support of my colleagues and supervisor at the new unit. It is a normal condition of work for the benefit of the Department of Transportation.

Cplt. Exh. F-4.

F. The June 1989 Evaluation

Garcia explained why on June 6-8, 1989, he combined establishing her Accounts Payable "Tasks and Standards" into a single exercise with an initial evaluation; this evaluation was in addition to the annual evaluation. Having reviewed perceived performance errors, including by way of illustration, incomplete assignments, he concluded that one way "to encourage the person to improve the performance . . . is to make an evaluation." Tr. 691; see Tr. 668, 699.

Among five tasks, he rated Complainant "satisfactory" as to three, voucher preparation, maintaining proper office logs, and verifying funds on the CRT machine. She was evaluated as "unratable" in two, maintaining office files for special cases only, and answering phones and taking messages. Her overall rating was "unratable." Under "Supervisor's Plans and Recommendations," he noted that "Ms. Yefremov is encouraged to take more initiative under supervision." Cplt. Exh. G-1. Attached to the evaluation is a page of Garcia's notes dated 6/8/89 and 6/9. His 6/8 notes include the following:

> She's afraid I'm in conspiracy with SS [Simon] or/an GG [Goodman] and I assure her that's not the case.
> (1) We are short of people
> (2) If we lose her, we'll be worse not better
> I assure her that's important she catch up with our routine.

Cplt. Exh. G-1.

G. Complainant Discharged

Simon and Garcia were of the opinion that the quality of her work did not improve after the June 1989 evaluation. For example, Garcia told Simon she filed away incomplete vouchers without processing

them for payment. She claims Garcia incorrectly evaluated her work as incomplete on the basis of discarded drafts. In any event, Simon called Yefremov into his office in August,

> And I had called up Ms. Yefremov into my office to again say, you know, "What's happening? Why can't you do the work?" And telling her we're giving you every opportunity to make good. And you continue to show--leave everybody dissatisfied. And her response to me after this whole big discussion was, "When do I get a raise?" This was in August of '89.

Tr. 489.

Simon recalled that at the end of the meeting he advised Yefremov she was being discharged.

On August 29, 1989, Simon wrote a note to files,

> AFTER DISCUSSION WITH MANNY GARCIA -AND DOCUMENTATION OF REPEATED ERRORS
> REVIEWS WITH SHERRY KAVALER - DECISION TO TERMINATE SEPT 8, 1989

Resp. Exh. 8.

On the same date, Simon sent Sherry Kavaler (Kavaler)[7] Assistant Personnel Director, DOT, a request to terminate Yefremov effective close of business September 8, 1989, stating inter alia,

> Ms. Yefremov was at first assigned to our Accounts Receivable unit within Fiscal Affairs. After complaints from her immediate supervisor she was transferred to Accounts Payable in order to give her another opportunity to adjust under another supervisor. Her performance has never been up to standards, and her present complains of continuing errors in her work.
>
> I believe we have given her every opportunity to improve and have failed.

Resp. Exh. 9.

On September 6 and 7, 1989, Yefremov was absent on sick leave. She complained of headaches and chest pains, physical symptoms she claims were a direct result of the pressures at work.

Yefremov reported for work on September 8. She had not received written notice from Simon or Garcia. On September 8, Simon addressed a note to the payroll office advising that Yefremov had been

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[7] Appears in transcript as Kavlar.

terminated effective close of business September 8. Resp. Exh. 10. As reflected in his memo to files of September 11, 1989,

> M YEFREMOV REPORTED TO WORK -
> I AGAIN ADVISED HER THAT SHE WAS TERMINATED AS OF 9/8/89
> SHE ACTS AS IF SHE DOESN'T UNDERSTAND STATING SHE WAS SICK
> I BELIEVE IT IS A PLOY.

Resp. Exh. 11.

Describing the circumstances of the memorandum, according to Simon

> Mr. Garcia came into my office, and I believe that she came in and sat down like nothing happened. And I called her into my office. And I again advised her that she was terminated as of September the 8th. And that she was to go home. That she had no more job.

Tr. 505.

On the same date, Kavaler sent a handwritten memo to one of her staff who supervised the Personnel Transaction Section that updates the personnel system "to take someone off payroll," Tr. 611,

> Helene
> Please terminate
> Margarita Yefremov
> SS#069-64-2947 Asst. Acct
> COB 9/8/89
> This was confirmed with
> Si Simon
> Thank you
> /s/ Sherry

Resp. Exh. 12.

Relying on the reference to "C.O.B.," Complainant contends she understood that Fiscal Affairs discharged her because it no longer had sufficient business to require her services, in contrast to the claim that her performance was inadequate. Tr. 106-107; Cplt. Exh. M. See also, Resp. Exh. 12.

On September 13, 1989, Yefremov filed her charge with SDHR, following an initial effort to obtain an appointment on August 30, 1989. SDHR denied her claim, and she appealed to EEOC. Both EEOC and SDHR found no evidence of DOT discrimination.

Yefremov's husband as early as September 4, 1989 had written to the Mayor of New York City to protest her termination. Yefremov characterizes the letter, which she refused to produce at hearing, as a

preventive effort, not a curative one. Cplt. Exhs. J, K, and L. Kavaler explained that some DOT documents show the termination date as close of business 9/9/89 because the Personnel Management System computer records removing the employee from pay status one day after the personnel action is taken. Payments subsequent to September 8 were explained as distributions to settle her payroll account in full, and not as salary for dates subsequent to September 8, 1989.

Yefremov received an October 3, 1989 letter from Mark Barron, DOT Director of Personnel. Acknowledging that the content was the same, she asserts that the original differs from the copy provided to her by DOT during trial preparation. Yefremov introduced photo enlarge-ments showing microscopic differentials in typeface between the two; in addition, the second copy was unsigned, and bears nomenclature not contained on the original. Kavaler explained that the difference in appearance between the two copies is accounted for by the fact that one is a copy of a carbon copy and, being an originator's file copy, bears indicia of internal distribution but no signature. Cplt. Exhs. M and M-1.

At hearing, Respondent introduced two schedules listing employees to reflect the demographic profile of the units in which Complainant had been employed, Billing and Accounts Receivable, and Accounts Payable. Both were compiled for the hearing. Exhibit 1 identifies employees other than Yefremov, by nationality and citizenship status for the period of her employment. Exhibit 2 identifies employees as of November 1992 in the same manner. DOT's unrebutted data show that of 25 employees on board between 5/2/88 and 9/8/89, twelve were native-born U.S. citizens, five of the remaining 13 were naturalized. DOT's unrebutted data show that of 25 employees assigned in November 1992, eleven were native-born U.S. citizens, seven of the remaining 13 were naturalized.

IV. *Discussion*

A. General Principles of §1324b Liability.

1. Complainant Has Standing

As already found and concluded, Yefremov has standing as a protected individual to maintain a claim of citizenship status discrimination, and of retaliation pursuant to 8 U.S.C. §1324b. 3 OCAHO 466. As an employer of more than three individuals, DOT is amenable to her claim of liability for violation of §1324b. 8 U.S.C.

§§1324b(a)(1)(B), b(a)(2)(A). Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, OCAHO Case No. 92B00068 (8/16/93) at 12; Westendorf v. Brown & Root, 3 OCAHO 477 (12/2/92) at 12; Lundy, 1 OCAHO 215 at 8. Lack of national origin jurisdiction does not bar administrative law judge authority with respect to citizenship status discrimination claims pursuant to 8 U.S.C. §1324b. Romo v. Todd Corp., 1 OCAHO 25 (8/19/88), aff'd., United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990); Lundy, 1 OCAHO 215; U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90), amended, 1 OCAHO 169 (5/10/90).

2. Title VII Principles As Adapted to §1324(b)

It is settled OCAHO caselaw that §1324b decision-making is informed by the law developed through interpretation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532 (6/25/93); U.S. v. Sargetis, 3 OCAHO 407 (3/5/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); Fayez v. Sheraton Corp., 1 OCAHO 152 (4/10/90); U.S. v. Lasa Marketing Firms, 1 OCAHO 106 (11/27/89); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89); Marcel Watch, 1 OCAHO 143; U.S. v. Mesa Airlines, 1 OCAHO 74, (7/24/89), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991).

Two judicially established principles of interpreting Title VII liability were well established by the time §1324b was enacted. One, the disparate treatment standard of proof applies when it is shown that an employer treats some people less favorably than others because of their race, color, religion, gender, or national origin.[8] The other, the disparate impact standard of proof applies where it is shown that discrimination results from an employer's practices that are facially neutral in their treatment of individuals but that, in the absence of a business necessity justification fall more harshly on one or another protected group.[9]

The President signed the Immigration Reform and Control Act of 1986 (INA), Pub. L. 99-603, 100 Stat. 3359,3374 into law on November 6, 1986. Section 102 of IRCA added Section 274A, codified as 8 U.S.C.

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[8] See International Bhd. of Teamsters v. United States, 431 U.S. 324, 334 (1977). Accord, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[9] See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (actual intent not necessary to prove discrimination under disparate impact test). See also Geller v. Markham, 635 F.2d 1027, 1031 (2d Cir. 1980) (quoting Teamsters, 431 U.S. at 335-36 n. 15).

§1324b, to the Immigration and Nationality Act (INA), as amended. The President's signing statement expressed the policy that the new antidiscrimination prohibition requires proof of discriminatory intent, i.e., evidence of knowing and intentional discrimination. The new law was to be understood to prohibit only that discrimination which could be proven to be disparate treatment, not disparate impact. See Statement of President Reagan upon signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986); Supplementary Information to 28 C.F.R. §44, 52 F.R. 37403 (1987) (Attorney General statement that intent to discriminate is an essential element of a charge). See Kamal-Griffin, at 12-13.

As stated in Marcel Watch,

> Title VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases. Liability under Section 102 is proven by a showing of deliberate discriminatory intent on the part of an employer.
>
> * * * *
>
> The Complainant must establish intentional discrimination by a preponderance of the evidence, i.e., "knowing and intentional discrimination." 8 U.S.C. §1324b(d)(2)).

1 OCAHO 143 at 13.

B. Intent to Violate 8 U.S.C. §1324b Need Not Be Proven

Knowing and intentional discriminatory conduct can be established without proof of intent to violate the law. The intent that need be proven is not intent to violate the law. It is sufficient to establish that the employer intended the conduct at issue. As stated in an employers sanction case with respect to the "knowing" conduct requirement of §1324a,

> [I]t is not intent to violate the law that is at issue but intent to perform an act for which the law has prescribed consequences, i.e., culpability for continuing to employ an unauthorized alien knowing the alien to be unauthorized. Cf. U.S. v. Marcel Watch Corporation . . . at 13, 15.

U.S. v. Buckingam Ltd. Partnership, 2 OCAHO 151 (4/6/90) at 10-11.

Marcel Watch is instructive,

> Employment discrimination jurisprudence turns on the basic question whether an employer who intentionally treats persons differently on a prohibited basis violates antidiscrimination laws, regardless of what motivates that intent.

1 OCAHO 143 at 13.

Accord, U.S. v. General Dynamics Corp., 3 OCAHO 517 (5/6/93) at 39-40.

> At issue is whether the discriminatory act is deliberate, not whether the violation of the law is deliberate or the result of an employer's invidious purpose or hostile motive. See, e.g., Nguyen v. ADT Engineering, 3 OCAHO 489, at 8 (Feb. 18, 1993) ("The discriminatee must only prove that the violative conduct occurred. A complainant does not need to prove that the conduct was intended to violate the proscription against discrimination"). . . . .

C. Allocation of Burdens Under 8 U.S.C. §1324b

The intersection of Title VII and OCAHO disparate treatment caselaw has resulted in adopting for §1324b cases the principles established by courts for the order and allocation of burden of proof in Title VII disparate treatment claims. Kamal-Griffin, OCAHO Case No. 92B00068; Westendorf, 3 OCAHO 477; Alvarez v. Interstate Highway Constr., 2 OCAHO 430 (6/1/91); Ipina v. Michigan Dept. of Labor, 2 OCAHO 386 (11/7/91); Huang, 2 OCAHO 364.

Proof of discrimination does not turn on a complainant's ability to produce "a smoking gun." Resare v. Raytheon Co., 981 F.2d 32 (1st Cir. 1992); Oxman v. WLS-TV, 846 F.2d 448, 455-56 (7th Cir. 1988). See Aikens, 460 U.S. 711, 715 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.") It is rare that the victim can prove that the employer conceded discrimination, e.g., "I do not want any permanent resident aliens working here." Nguyen v. ADT Engineering, 3 OCAHO 489 (2/18/93) at 8-11. But see Mesa Airlines, 1 OCAHO 74.

As first applied in Mesa Airlines, 1 OCAHO 74 at 41, the disparate treatment analysis of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k)(1964) underpins IRCA §102 discrimination analysis. Both Title VII and IRCA caselaw make clear that circumstantial evidence is sufficient to establish discrimination. The seminal cases, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and their progeny, provide the framework for proof of discrimination by indirect evidence. The McDonnell Douglas Corp./Burdine model instructs as to the proper allocation of the burden of proof between parties in disparate treatment discrimination cases. See also Fisher v. Transco Services- Milwaukee, Inc., 979 F.2d 1239, 1243 (7th Cir. 1992) ("[Complainants who allege disparate treatment discrimination] may assert that their employer's practice, while not necessarily intended, resulted in a significant disparate impact. . ."); Oxman v. WLS-TV, No. 84 C 4699

(N.D. Ill. 1993), adopting decision of magistrate, 60 Empl. Prac. Dec. ¶41,946 (1992).

Reciting the McDonnell Douglas/Burdine model, Marcel Watch states,

> To succeed in any Title VII employment action a complainant must (1) establish a prima facie case that a discriminatory act occurred, and (2) meet the evidentiary burden, i.e., burden of persuasion, that allows a court to find the alleged discriminatory act unlawful. The basic allocation of proof in disparate treatment cases is established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The same burden exists for complaints filed under Section 102 of IRCA. See, e.g., Mesa Airlines [1 OCAHO 74].

Marcel Watch, 1 OCAHO 143 at 13; U.S. v. Sargetis, 3 OCAHO 407 (3/5/92) at 26; Salazar-Castro v. Cincinnati Pub. Sch., 3 OCAHO 406 (2/26/92) at 7.

The Burdine court summarized the basic allocation of burdens and orders of presentation of proof, as originally set out in McDonnell Douglas.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [McDonnell Douglas Corp. v. Green, 411 U.S.] at 802. . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804.

Burdine, 450 U.S. at 248; Wilson v. Stroh Companies, 952 F.2d 942, 945 (6th Cir. 1992); Brownlee v. Chrysler Motors Corp., No. 89-CV-72108- DT (E.D. Mich. 1991). See also Furnco, 438 U.S. at 577 ("the method suggested in McDonnell Douglas . . . is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."); Aikens, 460 U.S. 711.

In contrast to the burden of persuasion, both parties bear the burden of production vis a vis an allegation of knowing and intentional citizen-ship discrimination.

1. Complainant's Traditional Prima Facie Burden

The McDonnell Douglas Court enumerated the elements of Complainant's prima facie hurdle.

To meet the initial burden of establishing a prima facie case, a complainant must show:

> (i) that he belongs to a protected class, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . .

McDonnell Douglas Corp., 411 U.S. at 802; Brownlee, Civil Action No. 89-CV-72108-DT.

The Court later explained the rationale behind its prima facie methodology.

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Furnco, 438 U.S. at 577.

2. Complainant's Prima Facie Burden in the Context of Discharge

Courts have adapted the seminal McDonnell Douglas formulation to discriminatory discharge allegations. In a case alleging violation of §510 of the Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. §1140, the Second Circuit, has held that "[T]he nature of the plaintiff's burden of proof at the prima facie stage is de minimus." Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). Accord, Melnyk v. Adria Laboratories, 799 F. Supp. 301, 313 (W.D.N.Y. 1992); Kamal-Griffin, OCAHO Case No. 92B00068, at 18.

The Dister court instructed that,

> In Title VII and ADEA cases, a plaintiff establishes a prima facie case of unlawful termination by showing that the plaintiff (1) belongs to a protected group, (2) was qualified for the position, and (3) was discharged or denied employment under circumstances that give rise to an inference of discrimination. See McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824 (Title VII); Russo, 837 F.2d at 43 (ADEA); Pena, 702 F.2d at 324 (ADEA).

859 F.2d at 1114-15.

See also, Nguyen, 3 OCAHO 489 at 8-11.

Kamal-Griffin is also instructive:

> "The method suggested in McDonnell Douglas for pursuing [the disparate treatment] inquiry . . . was never intended to be rigid, mechanized, or ritualistic." Furnco, 438 U.S. at 577. A Title VII plaintiff therefore can establish a prima facie case of individualized disparate treatment other than through a showing under the McDonnell Douglas paradigm by 'offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII].'" Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.), cert. denied, 112 S.Ct. 228 (1991) (quoting Teamsters, 431 U.S. at 336 (1977)).

OCAHO Case No. 92B00068 at 19.

Upon assessing the sufficiency of evidence of a prima facie case of wrongful discharge, and of the employer's response, the role of the adjudicator is limited.

> To begin with, it is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal. See Burdine, 450 U.S. at 259, 101 S.Ct. at 1097 ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability. . . ."); see also Meiri, 759 F.2d at 995.
>
> * * *
>
> Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons. See Graefenhain, 827 F.2d at 20 ("A business decision need not be good or even wise. It simply has to be nondiscriminatory. . . .). Thus, the reasons tendered need not be well-advised, but merely truthful. See Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.) (Title VII), cert. denied, __ U.S. __, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987).

Dister, 859 F.2d at 1116.

Moreover, an employer has broad discretion in defining expectations of employees' performance. Absent an illegality, an employee must acquiesce in those expectations, rather than perceive them as discriminatory. Nguyen, 3 OCAHO 489 at 12. Nguyen also addressed the roles of the employer, employees and adjudicator.

> The employee doesn't get to write his own job description. An employer can set whatever performance standards he wants, provided they are not a mask for discrimination on forbidden grounds such as race or age.

Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989).

Furthermore, it is not the judge's role to second guess employer decisions. As well stated,

> The business of business, and the sole concern of business is profit. And the law does not judge the wisdom of a company's business decision, unless a forbidden motive is present.

Oxman v. WLS TV, 60 Empl. Prac. Dec. ¶ 41,946, at 73,532.

> [C]ourts do not sit as a super-personnel department that re-examines [employer] decisions. [Cite omitted.] No matter how medieval an employer's practices, no matter how highhanded its decisional process, no matter how mistaken its managers.

Id. at 73,548.

D. Complainant Has Failed to Establish A Prima Facie Case of Citizen Status Discrimination

Patently, this is not a case of direct discrimination. There is no sug-gestion of acknowledged DOT discrimination against Complainant. Compare Mesa. Applying the burden shifting methodology for scena-rios involving indirect, i.e., circumstantial, evidence, once Yefremov establishes a prima facie case, a rebuttable presumption of discrimi-nation arises, and the burden of production shifts to DOT to articulate a legitimate, nondiscriminatory explanation for her discharge. If DOT succeeds, the presumption drops from the case, and the burden shifts back to Yefremov to show that DOT's proffered explanations are a pretext. Description of McDonnell/Burdine principles as applied to an age discrimination case is pertinent to the case at hand,

> The special virtue of the burden-shifting method of proof is that it allows victims of age discrimination to prevail without presenting any evidence that age was a determining factor in the employer's motivation. McDonnell Douglas and Burdine permit a plaintiff to recover, even if he or she is unable to discover evidence of discrimination, simply by proving that the employer's proffered justification is unworthy of credence.

Oxman, 60 Empl. Prac. Dec. ¶ 41,946, at 73,547.

Holding Yefremov to any reasonable standard compels the conclusion that her evidence failed to establish a prima facie case of discrimina-tion. Complainant's case falls far short of even the de minimus stand-ard of proof announced in Dister. Although Complainant has ardently presented a catalogue of injustices she suffered at DOT, her proof comprises only bald accusations. Granting her every concession as a pro se complainant, overruling DOT's motion for judgment at the conclusion of her case, I put DOT to its proof. That proof overwhelms

the record with justification for her discharge. Lopez v. Metropolitan Life, 930 F.2d at 157, 161 (2d Cir. 1991).

As discussed below, this case is so lacking in evidence of discrimination within the jurisdiction of an administrative law as to compel dismissal. The evidence presented demonstrates that during the pertinent time frame, Fiscal Affairs was generically multi-ethnic. I find and conclude that Goodman and Garcia were sympathetic managers. Their conduct was neither consistent with nor a mask for discrimination.

E. Complainant's Conspiracy and Fraud Theories Rejected

Complainant's proof consists exclusively of innuendo and unproven implications of document tampering and false dealings on the part of Fiscal Affairs managers, DOT counsel and others. For example, there is no credible evidence that documents are other than what they seem to be.

1. No Conspiracy To Deprive Her of Rights Under §1324b

Complainant's theories of conspiracy and fraud are unproven. I reject her rationale that DOT's failure to have contemporaneously provided her with copies of internal management documents proves that such documents are fakes. Her claim flies in the face of common bureaucratic efficiency and sound managerial principles -- the creation of an audit trail. For example, the series of September 1989 memoranda confirm, they do not impeach, the fact that she was fired effective the close of business on September 8, 1989. Her absence on sick leave immediately prior to the date of discharge does not obscure the effectiveness of summary removal of a non-tenured employee. In any event, she cannot have it both ways, claiming wrongful discharge as of a point in time, but clouding the fact of discharge. I conclude, moreover, that her husband's letter of September 4, to the Mayor, which she refused to provide, makes clear that she was on notice of her discharge, whether imminent or accomplished. Complainant's persistent conspiracy claim is, on this record, totally fatuous. Her effort to envelop adjudicatory authorities, state and federal, in the imagined design against her bespeaks the vacuousness of her claim. There is simply no evidence of a conspiracy to deprive Yefremov of rights conferred by §1324b.

2. Paperwork Claims Rejected

The claims of forgery fare no better. Comparison among many exhibits makes clear that Simon's initials "SS" are rendered differently standing alone than when he signs his full name "Simon." That distinction is without a difference, comporting with common experience. That the signature or formulation "SS" on a particular document differs from the norm or may not be familiar to a particular former colleague is not persuasive. More to the point is that Simon adopted the content of the memoranda as his utterances. Who affixed the initials is immaterial to the facts communicated by the memoranda. Even without Simon, however, the inescapable conclusion is that these internal documents comprised DOT's personnel files. The recipients confirmed they had received them. There is no basis on which to conclude they were not received and retained in the regular course of business. It cannot be doubted that Yefremov was fired in early September 1989. The managerial conduct and decision-making reflected by the allegedly tainted memoranda is irrelevant to the question whether she was discharged for an actionable unlawful reason.

No less realistic is the claim that because DOT's file copy of a document differed from the original sent to her by DOT, one copy or the other, or both, were forgeries. As I stated at hearing, and as I now conclude, the difference between the two is accounted for by the patently obvious fact that one is an original, the other an duplicate of the originating agency's file copy. I have considered all her claims of documentary tampering, and find them wanting, lacking any factual predicate.

Only an overriding preoccupation with intrigue can dictate belief that DOT's paperwork reflects a conspiracy to deprive Yefremov of rights protected by 8 U.S.C §1324b. I conclude that Yefremov's purportedly factual contentions concerning documentary irregularities were overcome by sufficiently plausible explanations. I find DOT personnel practices with respect to this employee to have been consistent with the reasonable realities of DOT Fiscal Affairs management. Complainant's assertions of suspicion never reached the level of proof. Seamless innuendo is no substitute for evidence.

3. Complainant's Credibility is Found Wanting

The behavior of DOT supervisors is not suspect. The testimony of any one of Complainant's former supervisors sufficiently persuades me that this employee was given full measure of opportunity to perform. In light of her performance record at DOT, and the absence of proof to support her contentions, I find no support for Yefremov's claimed

imaginings. In contrast to DOT's participation in this case, including its efforts to accommodate Complainant on discovery and post-hearing, Complainant has by her own behaviour jeopardized her credibility. Her failure, whether or not deliberate, to follow the judge's directions casts a long shadow on the credibility of her assertions of DOT managerial misconduct. Without cause, Complainant has exacerbated case management problems, including, for example, filing of ex parte pleadings in the face of explicit and repeated directions to the contrary; interposition of barriers to discovery, including failure to present documents available to her but not produced until she proffered them at hearing; failure despite explicit directions to prepare and distribute copies of exhibits proffered at hearing; twice threatening to abandon the hearing in progress;[10] attempting to rely on her husband's letter of September 4, 1989, but refusing to produce it. Tr. 599-601.[11]

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[10] During DOT's direct case Complainant asserted,

JUDGE MORSE: Do you have something you want to introduce?
Ms. YEFREMON: Yes.
JUDGE MORSE: Then it will have to wait until after they come on, unless you tell me you don't want to hear them, is that what you're saying?
MS. YEFREMON: Yes. I have to leave.
JUDGE MORSE: This is your case. It's highly unusual for the complainant to leave.
MS. YEFREMON: As I realize now and yesterday, to stay here to just listen a pack of lies --
JUDGE MORSE: It's unfortunate and regrettable that the employment situation that we're revisiting here is one in which there is obviously a great deal of tension and that the recollection of yours on the one hand and that of the other individuals significantly differ but you invited this when you filed the claim and the City defended it. Now at this point I am not prepared to tell the City to forego its witness but you must recall that the only reason they're putting on a case is because you've initiated a proceeding.
Ms. YEFREMON: Yes.
JUDGE MORSE: And you've persisted, you haven't volunteered to withdraw the case.
MS. YEFREMON: No.
JUDGE MORSE: You're not suggesting that.
MS. YEFREMON: No.

Tr. 598-9.

And again:

JUDGE MORSE: I'm going to take no more evidence on your appointment or on your files.
MS. YEFREMON: I say to you that I have to leave.
JUDGE MORSE: That's up to you.
MS. YEFREMON: Because you have not taken any evidence.
JUDGE MORSE: I have taken evidence.
MS. YEFREMON: I want to be taken as evidence that this personal history questionnaire . . .

Tr. 647.

[11] Judicial commentary addressing erroneous, duplicative and vexatious filings was aptly expressed in Kamal-Griffin, OCAHO Case No. 92B00068, at 7, n. 9. ("I have had the

(continued...)

Complainant's inability or refusal to understand directions continued unabated long after hearing. For example, she persists in the claim that an October 16, 1992 letter-pleading is "testimony at hearing."[12]

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[11](...continued)
arduous task of sorting through the pleadings and assorted documents Complainant has filed in this case").

See also ATX, Inc., Department of Transportation Docket 48780 (9/8/93) (Initial Decision) at 63 (the administrative law judge denied approval of an application to start a new airline, finding on the basis of its behavior in the adjudicative process that the applicant lacked "proper compliance disposition." Despite warnings by the judge, the applicant had indulged in a "pattern and practice of disobeying orders and filing frivolous and vexatious pleadings.")

[12] As characterized by Complainant, on post-hearing reply brief:

> According to the order of judge dated October 23, 1992 the Complainant was granted to use her own Motion for Summary Decision dated October 16, 1992 and which never was answered by Respondent. It means that the main principles of my complaint depicted in this motion must be the main points of my testimony at the hearing. The judge changed his own order and deprived Margarita Yefremov her constitutional right for her own defense. Instead of an extensive and detailed testimony I was forced to present the documents in evidence.
>
> I think it was done to please to Respondent. I think it was a very dangerous for a presiding judge to follow to the demands and authoritative influence of the legal representative of Respondent Ms. Goffin. The counsels Goffin and Colwin tried to deceive justice by openly corrupt and dishonest behavior and judge watched their tricks through the fingers.

Cplt. R.B. at 3.

Compare the judge's order dated October 23, 1992:

> On October 19, 1992, Complainant filed a 14 page letter-pleading dated October 16, with exhibits numbered MY-01 through MY-18 and attachments. On October 21, Complainant filed a one-page set of typographical corrections dated October 17.
>
> Complainant is advised that the exhibits will not be treated as evidence, except to the extent that they are tendered and received at the hearing. If she desires them to be so received, she will be expected to provide an additional set to be identified on the record and handed to the official stenographer at that time. Since Complainant has already provided a set to me and to City by the October 16 mailing, she does not need to provide more than the one set for the stenographer. However, any additional documents to be tendered must be provided at hearing in three copies.
>
> In light of Complainant's pro se status, I contemplate permitting her to take the 14 page document with her on the witness stand as an aid in presenting her direct examination.

(continued...)

In sum, Complainant acts in this case with a reckless disregard for accuracy, procedural regulations and orders of the judge. She lacks credibility on this record and on her claims before me.

F. Complainant's Theories Lack Probative Support

I find Complainant's theories of persecution to be lacking in factual content. I resolve differing versions of the truth in favor of DOT. Having seen and heard the witnesses, studied the evidence and having examined the pleadings, I am persuaded that Complainant's version is not trustworthy. But for efficiency in case calendaring, I would have preferred to take Simon's testimony in person and not by telephone. However, his testimony is consistent with and complements that of DOT's other witnesses, and the exhibits.[13] Even without his testimony, I do not doubt the authenticity of DOT documents provided directly from its files or produced by Yefremov as addressee or signatory. It is not for the judge to decide generally whether an employer deals with its employees in a spirit of generosity. Here, however, I do not doubt DOT's good faith efforts to treat Yefremov with consideration. But for Complainant's assertions and innuendo, her own testimony and exhibits support the conclusion that she was neither the victim of retaliation for asserting rights under §1324b, nor of citizenship status discrimination within the prohibition of that section. I find none of her self-serving explanations to be consistent with fact. To the contrary, her theories eclipse common experience.

G. The Discharge Was Not Improperly Motivated in Violation of 8 U.S.C. §1324b

[12](...continued)
3 OCAHO 466 at 5.

[13] Based on demeanor of Alymer, Goodman and Garcia, and on the internal consistency and rational content of their testimony, I am satisfied that DOT's witnesses are credible, supporting DOT's theory of the case even without Simon's testimony. The loss of opportunity to observe demeanor is not fatal to a finding of credibility. He was questioned by Complainant and the judge as well as by DOT counsel. The ability to make rational determinations of credibility does not depend on the opportunity to observe demeanor. See Olin Welborn, Demeanor, 76 Cornell L. Rev. 1075 (1991). The credibility determinations in this case are based on evaluations of the witnesses without bias in favor of management witnesses and without bias in favor of native-born witnesses. This decision is without regard or respect to the relative status or hierarchical position of management witnesses.

For the purpose of §1324 determinations in this case, I accept DOT practices as described by DOT witnesses and DOT documentation, as generally consistent with accepted public management principles. Whether DOT had as good a factual predicate to discharge Yefremov as they believed, and whether they had perfected a model personnel procedure, I find their managers had an honest belief in the employee's ineptitude. Goodman, Garcia and Simon extended themselves in response to a difficult and problematic employee. There is a total lack of evidence, direct or otherwise to support Complainant's version of her sixteen month stint at DOT. I am unable to conclude that the intradepartmental transfer in March 1989, the May and June evaluations, and the September 1989 discharge were motivated by citizenship status considerations. In contrast, I find a sufficiently coherent sequence of events to conclude that her discharge was based on judgments about the quality of her performance and not at all as a pretext for citizenship status discrimination. I find also, that there is no credible proof to support her claim that the June 1989 evaluation, September 1989 discharge and frustrations in her subsequent job search were proximately or otherwise caused by coercion, retaliation or other conduct prohibited by 1324b(a)(5), or by any managerial reaction as the result of her commentary on the May 10, 1989 evaluation or her May 17, 1989 filing with DOT EEO or any other discrimination claim she may have asserted.

Complainant has insisted that the June 1988 "Tasks and Standards" exercise was a positive evaluation. Contrasting the supposedly positive June 1988 evaluation with the two 1989 evaluations, she asserts that only discrimination and retaliation can explain the downward slope. Her claim that she was told the initial exercise was an evaluation beggars reality. She had been on the job only six weeks. The document is exactly consistent with establishment of standards, a stereotypical personnel management device. I credit Goodman's testimony that he did not tell her otherwise, and reject Complainant's contrary claim. It is not credible that she was told her performance was evaluated in June 1988 or that it was in fact evaluated at that time. Complainant's contention that the June 1988 exercise was in fact an evaluation persists even after hearing:

> Only one evaluation must be considered in serious as the genuine one. It is the first evaluation dated June 20, 1988 which reflects my [illegible] working style - unusual accuracy, good orderliness, purity of performance, perfect performance of each detail on the highest level of my enormous knowledge in law, criminology, business administration, taxation, book-keeping and simple clerical skills. I possess of enormous combination of American and Soviet education and experience. I have the most distinguished achievements in American educational experience, I was honored for my previous work for the city of New York by Award of Merits. (Footnote omitted).

Cplt. R.B. at 40.

I reiterate the conclusion I reached at the hearing that the June 1988 exercise was not an evaluation. Tr. 573.

Goodman was confident that Yefremov was aware of the deficience in her work. Explaining the May 1989 evaluation, he gave her an overall rating of conditional "because I was bending over backwards for her." Tr. 556. His explanation comports with common experience, if not the soundest managerial technique:

> The overall rating of conditional was put down here because I was bending over backwards for her. I knew that her work was unsatisfactory but If I had put down unsatisfactory the chances are she would have been fired. For the most part employees of the City of New York, New York City government is the employer of the last resort. Many people who can't obtain work in a private sector come to government, at least in New York City.

T. 556.

The documentary record as confirmed by Alymer and Garcia demon-strates that Yefremov was a marginal performer. On the basis of her demeanor in the hearing room, her performance during telephonic prehearing conferences, and considering her filings, I am convinced of her flinty, quarrelsome, unbending aspect. Although unlikely to admit it, she is frequently uncomprehending.

The conclusion is inescapable--this record is consistent with manage-ment's legitimate determination that it had expended all the resources it needed to on a difficult probationary employee. I do not find DOT's explanation for Yefremov's discharge to be pretextual. I do not find, either, that anything out of the ordinary transpired in the circum-stances of her discharge. Rather, although immaterial to her claims in this case, I conclude she knew at least by September 9, 1989, that September 8 was her last duty day.

As recently announced by the Supreme Court, modifying the McDonnell Douglas/Burdine paradigm, a discharged employee is not entitled to judgment as a matter of law even if it were found that the employer's explanation for discharge was pretextual. St. Mary's Honor Ctr. v. Hicks, 61 U.S.L.W. 4782 (1993). However, it is not necessary in this case to analyze the impact of St. Mary's on McDonnell Douglas/ Burdine in light of the conclusion that Yefremov's discharge was not a pretext for discrimination. To paraphrase a recent OCAHO decision, because DOT's asserted reasons for discharging Yefremov are legiti-

mate and nondiscriminatory, the presumption of discrimination drops from the case. Kamal-Griffin, at 22.

H. No Citizenship Status Discrimination Occurred

The threshold legal issue is whether a U.S. citizen can successfully maintain a citizenship status discrimination claim absent evidence that the employer discriminates against U.S. citizens in favor of non-citizens. OCAHO cases have addressed the liability of employers for discriminatorily failing to hire or for discharging U.S. citizens to the advantage of non-citizen employees. See Lundy, 1 OCAHO 215 (U.S. citizen complainant eligible for §1324b protection but complaint barred because of late-filing of OSC charge); accord Grodzki v. OOCL, 1 OCAHO 295 (2/13/91). Cf. Lewis v. McDonald's Corp., 2 OCAHO 383 (10/4/91).

Although no such case has yet found liability, it is well settled that a factual scenario may develop where an employer will be found to have discriminated against a U.S. citizen in favor of a non-citizen. Hensel, 3 OCAHO 532; U.S. v. McDonnell Douglas Corp., 2 OCAHO 351 (7/2/91) at 9-10; U.S. v. General Dynamics, 3 OCAHO 528 (5/6/93) at 20, appealed docketed, No. 93-70581 (9th Cir. 1993). Certainly there is no such claim here. Yefremov does not complain that DOT removed her, a U.S. citizen, in order to make room for a non-citizen. None of her proffered evidence gives rise to such a suspicion.

I understand Complainant to be claiming either that DOT disadvan-taged her because (i), she is a naturalized U.S. citizen, a member of a class against whom DOT invidiously discriminated, or because (ii), she is a naturalized U.S. citizen of Russian national origin, a member of a class against whom DOT discriminated generically.

1. Fiscal Affairs Employment of Naturalized Citizens

As to (i), the record is devoid of proof that DOT treated Yefremov differently than other employees because she obtained her citizenship through naturalization and not birth. Indeed, the profile of the DOT employee mix in Fiscal Affairs belies any claim of systemic discrimination against naturalized citizens. In the two Fiscal Affairs units involved in this case, of 25 individuals other than Yefremov employed between 5/88-9/89, five were naturalized U.S. citizens, 12 were native born U.S. citizens, eight were aliens; of the 25 employed in November 1992, seven were naturalized U.S. citizens, 11 were native born U.S. citizens, seven were aliens. I calculate that of 14 employees in Billing and Accounts Receivable from 5/88-9/89, only four

were still on board in November 1992; two (comprising 50% of the naturalized employees assigned during the earlier period) of the four were naturalized U.S. citizens. The counterpart data for Accounts Payable is that of 11 employees, 9 remained in the unit, of whom three (comprising 100% of the naturalized employees assigned during the earlier period) were naturalized U.S. citizens. Resp. Exhs. 1, 2.

The statistics contrast with Yefremov's claim. Moreover, adding Complainant to the 1988-89 statistics emphasizes the weakness of the citizenship discrimination claim. Of 26 employees, only 12 were citizens by birth; six were citizens through naturalization. Of 18 employees who were citizens, 1/3 were naturalized. Remarkably, in Accounts Payable only two of eleven individuals employed in 1988-89, were no longer in the unit in November 1992. One of the two died in 1989; neither were naturalized U.S. citizens. One third of employees in Accounts Payable, Yefremov's last DOT unit of assignment, who were still there when the November 1992 survey was made, were naturalized citizens.

Complainant made a flawed and belated effort to introduce testimony of a putative former employee to attest to Simon's insensitivity as a personnel manager. Not having sought, beforehand, to produce or identify the witness, Yefremov's offer of proof even with assist by the judge lacked sufficient identification to assure credibility. At most, it is the report to the SDHR by an individual--who knew Yefremov to be a Russian--that Simon had certain traits, none of which suggest citizenship discrimination. Even if creditable, as described by Yefremov, it totally fails to implicate bias by any DOT manager against naturalized citizens for the benefit of native born Americans.

2. Citizenship Status Was Never an Issue

As to (ii), the record is replete with assertions of discrimination, said by Complainant to be about citizenship but which sound only in national origin. As already found, DOT's conduct did not violate 8 U.S.C. §1324b. Assuming arguendo that her innuendo were to substitute for the facts found, the challenged practices would implicate national origin, not citizenship status discrimination. Yefremov abundantly illustrates alleged managerial criticism of her Russian oriented lack of English language skills. For example,

JUDGE MORSE: The distinction between national origin and citizenship is a very difficult ---

MS. YEFREMOV: --They did not accept me--

JUDGE MORSE: --consideration.

MS. YEFREMOV: --as a citizenship, as citizen of the United States. They only take me and show to me that I am stranger, outcast, that I am--

JUDGE MORSE: And the reason? And the reason?

MS. YEFREMOV: That I am Russian. That they do not accept, they did not want to understand that I am citizen of the United States at that time that I came, start to work in Department of Transportation and they know that I am citizen, but they disregard, ignore that.

JUDGE MORSE: But they know you were a citizen? Your supervisor knew that you were a citizen of the United States?

MS. YEFREMOV: Absolutely they knew.

JUDGE MORSE: Well how did they disregard it?

MS. YEFREMOV: They treat me as a Russian. Even I went--

JUDGE MORSE: How? Tell me what happened. Give me a specific--

MS. YEFREMOV: They name me, she is Russian. She doesn't understand English and they treated me in many ways not equal to them, outcast.

JUDGE MORSE: Because of your Russian origin or because they thought you were not a citizen of the United States? Which is it?

MS. YEFREMOV: Because they do not accept me as a citizen of the United States.

JUDGE MORSE: Because you were Russian origin, is that right?

MS. YEFREMOV: Yes, yes.

Tr. 71-72.

Q. Okay, thank you. What did they do? How did they discriminate against you because of your citizenship? What did they do? Let's start with Simon.

A. Simon told to me, first of all, he knows that I am a citizen of the United State [sic] but he told to me there is lot of native people with perfect English and you had, you have a bad English and you have to be pleased that I took you from the street.

Q. When did he tell you that?

A. When I try to told him about this offensive working environment--

Q. When? When? What day, if you can recall?

* * * *

Q. Is that March 13th, 1989?

A. March 13.

Tr. 257.

Q. Ms. Yefremov, if I could and just if, correct me if I'm wrong, when I'm finished.

And you will be terminated because you don't speak English correctly? Is that what you're saying?

Yes that--

Q. Is that what your testimony today is?

A. --I should be aware that there is a lot of native people with perfect English and I will be replaced in any moment that I am not obey to them.

Q. Okay. That was your second meeting. What was your third meeting with Mr. Simon?

A. The third meeting was in, on May 11, when, May 11, '89, when he tried to coerce me intimidating that because I don't want to sign the evaluation on May 10, I will be terminated.

Q. So that, on the third time, he threatened you with termination--

A. Yes.

Q. --because you didn't sign the evaluation.

A. I would, because I didn't sign on evaluation and he, the same time, repeat me the same word, that I have bad English, I have to keep in mind that there is a lot of native people with perfect English and I will know how to look for a job, and he was right.

Tr. 260-261.

Q. So that, to you, meant that he coerced you, because he said you had no choice?

A. And he said I will, I will be terminated.

Q. Oh, so he said to you, "you will be terminated.

A. Yes.

Q. --if you don't sign this evaluation"?

A. Yes, and he said, again, that I have bad English. I will know, you got very easy job, you, you access in very easy way job, so you don't know how to look for job.

Q. So he said it was because of your bad English? He didn't say --

A. Bad English.

Q. -- it was because you weren't a native born American citizen? Is that correct?

A. Yes, he said in the same thing, because of you have a bad English and there is lot of native with perfect English.

Tr. 269.

JUDGE MORSE: And what -- excuse me. What did you claim, again, in your EEO filing?

MS. YEFREMOV: I explain the situation, what it was that they discriminated, that there is offensive working environment--

JUDGE MORSE: All right, did --

MS. YEFREMOV: --there is hostility against me, as not accepting me as equal, that I am outcast and they treat me, even though that I am citizen of the United States, they treated me as a Russian. She just Russian. She just understanding, he said.

Tr. 270-271.

Q. Okay. What else? So, aside from--if I can just get this correctly, aside from the times that you went and spoke to Mr. Goodman about Miss Aylmer, how many times do you think, do you recall that you went to speak to him, speak to him about Miss Aylmer?

A. It was numerous time and numerous time he answer me different question. Once he said, once he, another time, he told me if I don't like such a treatment, I should back, go back to the Soviet Union.

Tr. 282.

Q. -- the chronology. What else did Mr. Goodman say to you that was discriminatory against your citizenship, that you claim is discriminatory against your citizenship?

* * * *

A. I said that it was enough that he said to me that I am, should be, treated not equal, that I am not accepted as equal, that I (sic) heard that I am Russian --

Q. But Ms. Yefremov --

A. --in the office --

Q. --that's not something that Mr. Goodman said to you. These are your feelings. Is that true? Isn't that correct?

A. No. It was I heard.

Q. Oh, so he told you, "I'm not treating you equally, because you're not--"

A. No, no. He didn't tell me, but he treat me as unequal.

Tr. 286-287.

A. Yes, he knows that I am citizen, but they didn't accept me as a citizen. They treated me as a Russian.

He told to me that it's natural feeling, what I expect for. It is natural feeling toward to you. If you don't like such a treatment, go back to Soviet Union.

Tr. 293.

Q. So she [Alymer] discussed your Russian background and your language.

A. No, no, no. My -- that I have American education and bad English. How she get American education.

JUDGE MORSE: You mean she commented that--

MS. YEFREMOV: Comment, yes.

JUDGE MORSE: -- how could you have gotten an American education because of such and extensive accent, is that what you're saying?

MS. YEFREMOV: Such bad english.

JUDGE MORSE: All right.

MS. COLWIN: Okay.

JUDGE MORSE: Let's go.

MS. YEFREMOV: And there was conversation about me, "She's Russian, she doesn't understand."

BY MS. COLWIN

Q. Okay. Ms. Yefremov, she didn't say this directly to you, is that correct? She didn't say these things to you directly?

A. I heard that. I heard that.

Q. I'm not questioning -- did she say these things to you directly?

A. She didn't say me directly. But I heard it.

Tr. 321-322.

Significantly, Complainant's claim continues to sound exclusively in national origin, even post-hearing: "I know that my actions are judged according to the double standard so widely used toward me as the citizen of the USA of a Russian national origin." Cplt. R.

B. at 1. On brief, Yefremov for the first time specifies that she is Beylorussian. Although a distinction of no significance during her DOT employment before dissolution of the Soviet Union, it may be supposed that the reason she now points out that she emigrated not from Russia but from Beylorussia is to support the accusation that "[T]he authors of my termination are guilty in damaging the reputation of the USA by the use of practices directed against the intellectuals from Russia and other independent republics of the former USSR. Id. at 37. That claim is irrelevant and without foundation in this case.

Citizenship status discrimination differs from national origin discrimination. See Espinoza v. Farah, 414 U.S. 86 (1973).

In Espinoza, the Supreme Court acknowledged that

> a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination," and that "an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.

Id., at 92.

Another pre-IRCA formulation is instructive:

> [e]mployment discrimination against American citizens based merely on country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII, as well as notions of fairness and equity.

Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669, 675 (D. Md 1984).

In Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/91) (Decision and Order Approving in Substantial Part the Agreed Disposition Among the Parties) at 3, (citing 3 OCAHO 415 (3/8/91) (Second Prehearing Conference Report), dismissal of national origin claims by a naturalized citizen of Soviet origin did not defeat the citizenship status discrimination claim.) Roginsky is distinguishable from the present case because Roginsky implicated an explicit facially discriminatory policy whereby (i) a federal agency refused employment to naturalized citizens born in identified foreign countries unless they had been U.S. citizens for at least 5 years or had resided in the United States for at least ten years, (ii) the policy disadvantaged U.S. citizens from a number of countries determined to have interests adverse to the United States, i.e., a distinction based on political, not alienage

grounds, and (iii) the policy distinguished between work eligibility of individuals otherwise identically situated based on how long they had been U.S. citizens. Moreover, Roginsky never reached a final decision on the merits of the discrimination claim, but was ultimately the subject of an agreed disposition. Id.

Cases involving only citizenship are outside Title VII. See e.g., Novak v. World Bank, 20 Empl. Prac. Dec. ¶ 30,021 (D.D.C. 1979) (discrimination against individuals, whether or not naturalized, solely because they are U.S. citizens is citizenship discrimination). Accord, Vicedomini v. Alitalia Airlines, 33 Empl. Prac. Dec. ¶ 32,247 (S.D.N.Y. 1983) (no national origin discrimination where replacement employee is of the same national origin). See also, Dowling v. U.S., 476 F. Supp. 1018 (D.C. Mass. 1979). Considering that §1324b has its genesis in Espinoza, citizenship discrimination claims remain outside Title VII but discrimination that implicates national origin remains squarely within Title VII, not IRCA.

The comment in a recent OCAHO decision is persuasive:

> Complainant apparently is unaware that an individual's accent implicates his or her national origin. See Fragrante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990); Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Dept. of Public Welfare, 628 F.2d 980 (6th Cir. 1980) (per curiam); Mejia v. New York Sheraton Hotel, 459 F.Supp. 375 (S.D.N.Y. 1978). See also 29 C.F.R. § 1606.1 (Equal Employment Opportunity Commission's Guidelines on Discrimination Because of National Origin, defining national origin discrimination as including "linguistic characteristics of a national origin group").

Kamal-Griffin, OCAHO Case No. 92B00068, at 25.

The putative conduct alleged by Complainant is not citizenship- related within the scope of §1324b. I find Complainant's citizenship status claim to be a make-weight; her own assertions can be understood only as national origin accusations.

I. Failure to Establish Discrimination Against U.S. Citizen Absent Proof of Intent to Favor Non-Citizen

Title 8 U.S.C. §1324b caselaw has found in favor of U.S. citizen claims where the employer insisted on particular documents to satisfy §1324a paperwork verification requirements and employment was refused, Marcel Watch, 1 OCAHO 143 (3/22/90), or the employee discharged, Jones v. De Witt Nursing Home, 1 OCAHO 189 (6/29/90). See 8 U.S.C. §1324b(a)(6) (over documentation prohibition added to §1324b). Marcel Watch and Jones found employers guilty of

overdocumentation in their zeal to comply with the employer sanctions requirements of §1324a. I am unaware of any other citizenship status discrimination cases holding employers liable for failing to hire or for discharging U.S. citizens.

None of Yefremov's four former supervisors who testified at hearing acknowledged awareness of her citizenship status, as distinct from her national origin.[14] Absent knowledge by the employer of the employee's citizenship, there can be no finding of citizenship status discrimination. Martinez v. Lott Constructors, Inc., 2 OCAHO 323 (5/30/91). Even if such knowledge were assumed on their part, there is no evidence that this conduct was animated by such status. There is no proof of discrimination against Yefremov because she is a U.S. citizen to the advantage of a non-citizen. There is no proof of discrimination against her because she is a naturalized citizen to the advantage of a native-born U.S. citizen.

Complainant has characterized the Fiscal Affairs workplace as a "hostile environment." The right to work in an environment free from discriminatory intimidation, ridicule and insult has been protected under Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). On the full evidentiary record before me, having heard the witnesses and examined the exhibits, I find no evidence that such an environment existed at DOT with respect to Complainant. As inharmonious as the relationship may have been between Yefremov and her DOT colleagues, nothing in this case points to citizenship discrimination as the cause.

It is not for the judge to determine whether DOT could have managed the employee resource in a more generous or different fashion.[15] My duty is to determine whether there is a preponderance of evidence that DOT engaged in unfair immigration-related

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[14] The former supervisors who testified all denied that they had been aware of her citizenship status, as distinct from what they thought had been her national origin. Alymer, Tr. 403; Goodman, Tr. 541; Simon, Tr. 449-50; Garcia, Tr. 684.

[15] See U.S. v. General Dynamics Corp., 3 OCAHO 517 at 59. (Rejecting the discrimination claim as unproven, the judge held that it was not his role "to second-guess an employer's business decision, but to look at evidence of discrimination. Cotton v. City of Alameda, 812 F.2d 1245, 1249 (9th Cir 1987). See also Douglas v. Anderson, 656 F.2d 528, 534 (9th Cir. 1981) ('The reason for a business decision need not meet the unqualified approval of the judge or jury, so long as it is not based on [a protected characteristic].')." Accord, Kamal-Griffin, at 34 (where complainant failed to establish knowing and intentional discrimination).

employment practices, i.e, by discharging Complainant for reason of her citizenship status in violation of §1324b(a)(1), and/or by intimidating, threatening, coercing or retaliating against her in violation of §1324b(a)(5). I find and conclude that Complainant lacks a successful claim under 8 U.S.C. §1324b. This record is devoid of any evidence that Complainant was discriminated against on the basis of her citizenship status. I conclude, therefore, that there is no basis for finding discrimination in violation of §1324b.

J. The Retaliation Claim Is Theoretically Applicable

Respondent defended against the retaliation claim both as matter of law and on the facts. Respondent argues in effect that the retaliation claim must fail because Yefremov's claim had accrued in September 1989, prior to 1990 enactment of the statutory cause of action. DOT claims that §1324b(a)(5) is not retroactive. Respondent also argues that DOT Fiscal Affairs managers received no reference inquiries about Yefremov and, therefore, never had an occasion to give out negative references.

Respondent is correct that the INA was amended to add retaliation jurisdiction in 1990, after Yefremov was discharged. INA §274B(a)(5) [8 U.S.C. §1324b(a)(5)] added by Section 534(a), Pub. L. 101-649, 104 Stat. 4978 (1990) (IMMAT 90). DOT is correct also that Section 534b, Pub. L. 101-649, specified an effective date: "The amendment made by subsection (a) shall apply to actions occurring on or after the date of enactment of this Act," i.e., November 29, 1990.

DOT's argument overlooks that prior to IMMAT 90 which, inter alia enacted INA §274B(a)(5), codified as 8 U.S.C. §1324b(a)(5), the Department of Justice by regulation had asserted retaliation jurisdiction pursuant to §1324b as originally enacted in 1986:

> No person or other entity subject to §44.200(a) shall intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured by this part or because he or she intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

28 C.F.R. §44.201.

The quoted regulation has formed a part of the Department's imple-mentation of §1324b since 1987. 52 Fed. Reg. 37409 (1987). The conference committee reporting out S. 358 which became IMMAT 90 acknowledged as much, referring to proposed Section 534 "Anti-Reta-liation Protections," at subsection 534(a), as a "CODIFICATION OF

REGULATION." H.R. Rep. No. 101-955 (Oct. 26, 1990) at 82. As reported and as enacted, the text of §1324b(a)(5) is identical in all material respects to the text of 28 C.F.R. §44.201.

No authority has been provided to me which casts doubt on the prior effectiveness of the regulation as a precursor to the legislative codification. Rather, 28 C.F.R. §44.201 has been explicitly held to be a lawful exercise of the Attorney General's authority under §1324b. U.S. v. Southwest Marine Corp., 3 OCAHO 429 (5/15/92) at 23 (the purpose of §1324b "would be eviscerated if employers are permitted, through retaliatory conduct, to discourage employees . . . from asserting . . . charges of immigration-related unfair employment practices"). I agree with Southwest Marine. I conclude that the regulatory anti-retaliation provision is available to Complainant.

It is understood that

> The order and allocation of burdens of proof in retaliation cases follow that of general disparate treatment analysis as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Davis v. SUNY, 802 F.2d 638, 642 (2d Cir. 1986), Schlei and Grossman, Employment Discrimination Law, 557 (1983). Plaintiffs bear the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.

Sumner v. U.S. Postal Service, 899 F.2d 203, 208 (2d Cir. 1990).

Making clear that the McDonnell Douglas and Burdine paradigm applies to retaliation actions, the Second Circuit described the appropriate analysis,

> To prevail in a §704(a) retaliation case, the plaintiff must show that he engaged in protected participation or opposition under Title VII, that the employer was aware of this activity, that the employer took adverse action against the plaintiff, and that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980).

Sumner at 208-9.

The prohibition against discrimination may be violated even if there were objectively valid grounds for the discharge. DeCintio v. Westchester County Medical Ctr., 821 F.2d 111, 116, n. 8 (2d Cir. 1987), cert. denied, 484 U.S. 965 (1987). For example,

> To establish that his activity is protected under Title VII, a plaintiff need not prove the merit of his underlying discrimination complaint, but only that he was acting under a

> good faith, reasonable belief that a violation existed. Grant v. Hazlett Strip-Casting Corp., 880 F.2d 1564, 1569, (2d Cir. 1989); Manoharan v. Columbia University College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988).

Sumner at 209.

In Davis v. State Univ. of N.Y., 802 F.2d 638, 642 (2d Cir. 1986) the court had previously stated that a "finding of unlawful retaliation is not dependent on the merits of the underlying discrimination complaint." See also Abel v. Bonfanti, 625 F. Supp. 263, 267 (S.D.N.Y. 1985) (to establish the first element of a prima facie retaliation case, i.e., that the employee engaged in activity protected under Title VII, of which the employer had knowledge, the employee "is not required to show that the underlying challenged activity was in fact illegal discrimination."). The Davis court, citing Abel, said that Title VII is violated if a retaliatory motive played a part in the adverse employment action "even if it was not the sole cause," but found that retaliation had not been proven. See 3 Arthur Larson and Lex Larson, Employment Discrimination, §87.12(b) (1993).

For a retaliation claim to survive failure to prevail on the underlying claim,

> the manner of the employee's opposition [the action which gives rise to the claim of retaliation] must be reasonable, as determined on a case by case basis, by balancing the purposes of Title VII, and the need to protect individuals asserting rights thereunder, against an employer's legitimate demands for loyalty, cooperativeness and a generally productive work environment. [citations omitted].

Francoeur v. Corroon & Black Co., 552 F. Supp. 403, 412 (S.D.N.Y. 1982).

The theoretical underpinnings of the retaliation claim in this case is distinguishable from my decision in Brooks v. Watts Window World, OCAHO Case No. 92B00193 (8/31/93). Brooks instructs that discharge prior to taking steps to secure rights under §1324b, or indicating to the employer she would take such steps is not protected:

> Absent reason given to the employer by the employee, or on her behalf, for the employer to anticipate the employee's acting pursuant to §1324b, discharge prior to filing a charge of discrimination under §1324b is not retaliation under §1324b.

Id. at 2.

It may be speculated whether §1324b(a)(5) applies at all in a case where explicit reference to covered discrimination, i.e., citizenship status discrimination, first appears in the filing with OSC. Yefremov's

May 17, 1989 protest letter to EEO DOT did not implicate citizenship status.[16] Cplt. Exhs. F-1-4. Coverage under 8 U.S.C. §1324b(a)(5) requires a finding that the particular cause of action implicates rights and privileges "secured under" or involves proceedings "under" subsec-tion (a)(5). With respect to retaliation in context of national origin claims which exceed OCAHO jurisdiction, the better rule would seem to be that jurisdiction follows the underlying claim, i.e., EEOC, not OCAHO. Recognizing the remedial purpose of (a)(5) suggests that retaliation jurisdiction should not depend on the sophistication of the claimant. See e.g., Westendorf, 3 OCAHO 477 at 6; Ekunsumi v. Hyatt Regency Hotels of Cincinnati, 1 OCAHO 128 (2/1/90) at 6-7 (liberal interpretations of charges and complaints under §1324b). Compare Huang v. U.S Postal Service, 2 OCAHO 313 (5/7/91), aff'd., 962 F.2d 1 (list) (2d Cir. 1992). Failure to articulate a citizenship status claim in the protest which gives rise to the retaliation claim should not per se, bar administrative law judge consideration of the retaliation claim. As a general rule, to expect a lay person to articulate precisely which type of discrimination is alleged would be an unduly harsh approach to interpreting a civil rights statute. DOT EEO understood her to claim "ethnicity" discrimination. Cplt. Exh. G. On the basis of the allega-tions in the exhibits in the record, I conclude that once Yefremov filed her OSC charge of citizenship status discrimination and retaliation she became eligible for consideration of the §1324b retaliation claim.

K. The Principles Applied Do Not Benefit Complainant

Application of retaliation law principles fails to benefit Yefremov. Her claim can be understood to embrace one or more of five situations: (1) the March 1989 intradepartmental transfer; (2) the May 1989 evaluation; (3), the June 1989 evaluation; (4) the September 1989 discharge, and/or (5) post-employment negative recommendations to prospective employers.

There is no semblance of a prima facie showing as to (1) and (2) because both the March 1989 transfer and the May 1989 evaluation preceded her May 17, 1989 protest letter to DOT EEO. As to (5), the record is absolutely devoid of any basis for an inference that a negative or any recommendation was made by anyone in DOT. The claim that an aggressive job search inherently produces employment inquiries has no evidentiary underpinnings on this record.

[16] DOT EEO was unsure of the gravamen of her claim, responding on June 16, 1989 that it found "no indication of discrimination or harassment based on your Ethnicity and Religion." Cplt. Exh. G.

As to (3) and (4), Fiscal Affairs managers were unable to recall having been aware of the May 17 letter. Assuming that DOT EEO's knowledge were imputed to Fiscal Affairs, I am unable to agree with Complainant that the June evaluation or discharge were proximately caused by her letter. This was not an employee reticent to talk back, but nothing in the continuing dialogue between Yefremov on the one hand and Garcia and Simon on the other hand addresses the letter. In contrast, I am satisfied that the June evaluation, substantially consistent with the one in May, is an accurate reflection of management's perception of an obviously difficult employee.

V. *Conclusion*

On the basis of her participation in this case, on the pleadings and in person, after opportunity to observe her at hearing, and having partici-pated in telephonic prehearing conferences, I conclude that Yefremov is a person who either does not or cannot understand and follow directions or accept criticism. Arguably, the juxtaposition of the May 17 letter and the subsequent evaluation and discharge may be understood to satisfy Complainant's burden of establishing a prima facie retaliation claim. In that respect, however, the record fails to demonstrate any causal connection between the letter and subsequent personnel actions.

I find that Complainant's performance as described by Garcia suffi-cient to support Simon's decision to discharge her. I agree with DOT:

> Complainant told the Court that she was not terminated because of her job performance although her evaluations portray a different story. Complainant's explanation for the disparity is that her evaluations were contrived.

R. Memo at 5.

Yefremov's failure to improve her performance in the face of managerial encouragement, and serious conflicts with all those in managerial authority demonstrate legitimate, nondiscriminatory reasons for the discharge. Davis v. State Univ., 802 F.2d at 638. Yefremov was not more closely supervised or watched than other employees because of her citizenship status; neither was she dis-charged for that reason. There is no evidence that she was in any way retaliated against because of the expression of any rights she might have under §1324b. The evaluations in May and June 1989 were legitimate personnel management techniques. The evaluations were not contrived. Complainant was discharged by reason of inadequate performance. Complainant has totally failed to persuade the trier of

fact that an unlawful retaliatory motive played a part in any adverse action against her.

VI. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, testimony, evidence, memoranda, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that:

1. Complainant has failed to prove by a preponderance of the evidence that Respondent discriminated against her based on her citizenship status; and

2. Complainant has failed to prove by a preponderance of the evidence that Respondent discriminated against her by retaliation, intimidation, threat or coercion.

Upon the basis of the whole record, consisting of the evidentiary record and the pleadings of the parties, I am unable to conclude that a state of facts has been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. §1324b(g)(2)(A). I find and conclude that Respondent has not engaged and is not engaging with respect to Complainant in the unfair immigration-related employment practices alleged and within the jurisdiction of this Office, i.e, citizenship based discrimination, and retaliatory conduct. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. §1324b(i).

SO ORDERED.

Dated and entered this 21st day of September, 1993.

MARVIN H. MORSE
Administrative Law Judge